

Jay Edelson (Admitted *pro hac vice*)
jedelson@edelson.com
EDELSON PC
350 North LaSalle Street, 13th Floor
Chicago, Illinois 60654
Tel: 312.589.6370
Fax: 312.589.6378

Shawn A. Williams (213113)
shawnw@rgrdlaw.com
ROBBINS GELLER RUDMAN & DOWD LLP
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, California 94104
Tel: 415.288.4545
Fax: 415.288.4534

Paul J. Geller (Admitted *pro hac vice*)
pgeller@rgrdlaw.com
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, Florida 33432
Tel: 561.750.3000
Fax: 561.750.3364

Joel H. Bernstein (Admitted *pro hac vice*)
jbernstein@labaton.com
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
Tel: 212.907.0700
Fax: 212.818.0477

[Additional counsel appear on the signature page.]

Counsel for Plaintiffs and the Putative Class

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

*In re Facebook Biometric Information
Privacy Litigation*

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 3:15-cv-3747-JD

**PLAINTIFFS' OPPOSITION TO
FACEBOOK'S ADMINISTRATIVE
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF**

Judge: Honorable James Donato
Action filed: August 17, 2015

Facebook’s “Administrative Motion for Leave to File Supplemental Brief” (dkt. 189), which is nothing more than a post-argument attempt to submit new, non-binding, and cumulative authority, should be denied. Plaintiffs have no quarrel with Facebook bringing the order in *Vigil v. Take-Two Interactive Software, Inc.*, No. 15-cv-8211, 2017 WL 398404 (S.D.N.Y. Jan. 27, 2017), to the Court’s attention—Plaintiffs presume that the Court would have found the case, anyway. But the Court should not grant Facebook leave to file its Supplemental Brief.

1. Leave to file a statement of supplemental authority after a motion hearing should be granted “sparingly.” See *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 943 n.5 (N.D. Cal. 2015); *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 761 F. Supp. 2d 904, 909 (N.D. Cal. 2011). And any filing submitted under N.D. Cal. L.R. 7-11 regarding supplemental authority should “avoid arguing the merits to the extent possible.” *Michael Taylor Designs*, 761 F. Supp. 2d at 909. Instead, such a filing should state simply why the decision is relevant: either it is “an on-point controlling precedent,” *id.*, or a “particularly germane legal authority” due to “highly similar factual allegations” or “unsettled areas of law,” *Sciortino v. Pepsico, Inc.*, 108 F. Supp. 3d 780, 793 n.4 (N.D. Cal. 2015). Facebook’s proposed filing goes beyond explaining why the decision in *Vigil* deserves consideration and instead improperly argues the merits. Facebook also omits discussing a key factual dissimilarity between *Vigil* and this case: Unlike Facebook, the defendant in *Vigil* repeatedly informs consumers that they are collecting biometric information and permits consumers to use the product without authorizing that collection. See 2017 WL 398404, at *4. Here, Facebook’s collection of biometric information is both automatic and undisclosed. (Dkt. 40, ¶¶ 3-4, 21, 26.) Finally, the decision is cumulative of authority already presented to this Court. Indeed, *Vigil* largely rehashes the flawed analysis in *McCollough v. Smarte Carte*, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016). Facebook discussed *McCollough* at length both in briefing and during the October 27 hearing. See Dkt. 140, at 1, 5, 7, 10; October 27 Tr. at 7-10. *Vigil*, therefore, breaks no new ground. As such, leave to file should be denied. See *Michael Taylor Designs*, 761 F. Supp. 2d at 909; see also *Rodgers*

1 *v. Claim Jumper Restaurant LLC*, 2015 WL 1886708, at *15 (N.D. Cal. Apr. 24, 2015) (striking
2 argument included in a statement of recent decision for violating Rule 7-3(d)).

3 2. Should the Court elect to consider the argument included in Facebook’s proposed
4 supplemental brief, Plaintiffs incorporate the following response. *See Sciortino*, 108 F. Supp. 3d
5 at 793 n.4 (exercising discretion to consider substantive filing submitted in response to pose-
6 argument statement of recent decision). In the briefing on Facebook’s Motion to Dismiss (dkt.
7 129), Plaintiffs urged that, under the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*,
8 136 S. Ct. 1540 (2016), the focus of the standing inquiry is on the interest protected by statute.
9 (Dkt. 138, pp. 2-5, 10-12.) Facebook, by contrast, asserted that a plaintiff has standing to sue
10 only if they have suffered some sort of consequential, real-world harm by virtue of the
11 Defendant’s violation of the law, and now cites *Vigil* as support for its position. (Dkt. 129, pp. 4-
12 5, 9.) In two recent decisions, the Ninth Circuit has rejected Facebook’s understanding of *Spokeo*
13 and instead adopted Plaintiffs’ reading of the decision, a reading inconsistent with *Vigil*.

14 In *Syed v. M-I LLC*, __ F.3d __, 2017 WL 242559 (9th Cir. Jan. 20, 2017), the court
15 concluded that the plaintiff had standing to assert a violation of the FCRA’s requirement that any
16 disclosure that a credit check will be performed be made in a document containing no other
17 information. *Id.* at *4. That disclosure requirement, which is coupled with an authorization
18 requirement, *see* 15 U.S.C. § 1681b(b)(2)(A), creates, the court held, both “a right to
19 information” and “a right to privacy.” 2017 WL 242559, at *4. Invasion of those statutorily
20 created rights, the court held, sufficed to show a concrete injury under *Spokeo*.

21 In *Van Patten v. Vertical Fitness Group, LLC*, __ F.3d __, 2017 WL 460663 (9th Cir.
22 Jan. 30, 2017), the court concluded that receipt of a text message allegedly in violation of federal
23 law was a concrete injury because the text message cause “the precise harm and infringe[d] the
24 same privacy interests Congress sought to protect.” *Id.* at *4. Consequently, the court held that
25 the unsolicited text messages “by their nature, invade privacy interests” and no “*additional* harm
26 beyond the one Congress” identified was necessary. *Id.*

Facebook nevertheless has submitted the recent order in *Vigil v. Take-Two Interactive Software, Inc.*, 2017 WL 398404 (S.D.N.Y. Jan. 27, 2017), as supplemental authority on the belief that it forecloses Plaintiffs’ claim to have suffered a concrete injury in this case. Facebook is incorrect.

First, as a factual matter, and as alluded to above, the allegations in *Vigil* do not demonstrate an invasion of the plaintiffs’ statutorily protected interest in controlling the collection of their biometric information. *See* 740 Ill. Comp. Stat. 14/15(b) (“No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifier or biometric information, ***unless it first informs the subject ... in writing that a biometric identifier or biometric information is being collected or stored***”) (emphasis added). Instead, the software at issue in *Vigil* repeatedly informed the plaintiffs that their biometric information was being collected, and offered them the opportunity to use the software without turning over their biometric information. Here, by contrast, Facebook collects biometric information as a matter of course, and without informing individuals that they are doing so. (Dkt. 40, ¶¶ 3-4, 21, 26.) While Facebook’s Terms of Service do disclose the “Tagging” feature used by Facebook, nowhere does Facebook indicate how this feature operates. And in any event, the central BIPA violation alleged here—Facebook’s collection of scans of face geometry from uploaded photos—occurs *before* the “Tagging” feature is applied. Because Facebook’s actions directly invade the interest protected by the BIPA, Plaintiffs have standing. *See Van Patten*, 2017 WL 460663, at *4; *Syed*, 2017 WL 242559, at *4.

Second, the *Vigil* court erroneously focused on retention and misuse of biometric information, as opposed to the undisclosed, uninformed, and unlawful *collection* of biometric information. *See Vigil*, 2017 WL 398404, at *9. Contrary to the teachings of *Van Patten* and *Syed*, the court in *Vigil* focused on the consequences stemming from the defendant’s statutory violation. *See* 2017 WL 398404, at *9. *Vigil*’s conclusion that the collection of face geometry without authorization “can only support standing if they pose a material risk of harm to the data

1 protection goal of the BIPA,” *id.* at *10, thus derives from a misdirected inquiry. Indeed, the
2 *Vigil* court’s understanding of the BIPA would deny BIPA’s promise of privacy precisely where
3 the statute is most directly aimed: When biometric information is harvested without an
4 individual’s knowledge or consent, just as happened here. The BIPA provides those individuals
5 with a right to control the collection of their biometric information. Under *Van Patten*, *Syed*, and
6 *Spokeo*, the invasion of that interest is a concrete injury in fact.

7
8 Respectfully submitted,

9 **ADAM PEZEN, CARLO LICATA, and**
10 **NIMESH PATEL**, individually and on behalf of all
others similarly situated,

11 Dated: February 7, 2017

By: /s/ Rafey Balabanian
One of Plaintiffs’ Attorneys

13 Jay Edelson (Admitted *pro hac vice*)
14 jedelson@edelson.com
EDELSON PC
15 350 North LaSalle Street, 13th Floor
Chicago, Illinois 60654
16 Tel: 312.589.6370
Fax: 312.589.6378

17 Rafey S. Balabanian (admitted *pro hac vice*)
18 rbalabanian@edelson.com
EDELSON PC
19 329 Bryant Street, Suite 2C
20 San Francisco, California 94107
Tel: 415.234.5342
21 Fax: 415.373.9495

22 Shawn A. Williams (213113)
23 shawnw@rgrdlaw.com
24 David W. Hall (213113)
dhall@rgrdlaw.com
25 ROBBINS GELLER RUDMAN & DOWD LLP
Post Montgomery Center
26 One Montgomery Street, Suite 1800
San Francisco, California 94104

1 Tel: 415.288.4545

2 Fax: 415.288.4534

3 Paul J. Geller (Admitted *pro hac vice*)

4 pgeller@rgrdlaw.com

5 Stuart A. Davidson (Admitted *pro hac vice*)

6 sdavidson@rgrdlaw.com

7 Mark Dearman (Admitted *pro hac vice*)

8 mdearman@rgrdlaw.com

9 Christopher C. Martins (Admitted *pro hac vice*)

10 cmartins@rgrdlaw.com

11 ROBBINS GELLER RUDMAN & DOWD LLP

12 120 East Palmetto Park Road, Suite 500

13 Boca Raton, Florida 33432

14 Tel: 561.750.3000

15 Fax: 561.750.3364

16 Travis E. Downs III (Admitted *pro hac vice*)

17 travisd@rgrdlaw.com

18 ROBBINS GELLER RUDMAN & DOWD LLP

19 655 West Broadway, Suite 1900

20 San Diego, California 92101

21 Tel: 619.231.1058

22 Fax: 619.231.7423

23 Joel H. Bernstein (Admitted *pro hac vice*)

24 jbernstein@labaton.com

25 Corban S. Rhodes (Admitted *pro hac vice*)

26 crhodes@labaton.com

27 Ross M. Kamhi (Admitted *pro hac vice*)

28 rkamhi@labaton.com

LABATON SUCHAROW LLP

140 Broadway

New York, New York 10005

Tel: 212.907.0700

Fax: 212.818.0477

Counsel for Plaintiffs and the Putative Class

1 **CERTIFICATE OF SERVICE**

2 I, Rafey Balabanian, hereby certify that on February 7, 2017, I served the above and
3 foregoing ***Plaintiffs' Opposition to Facebook's Administrative Motion for Leave to File a***
4 ***Supplemental Brief*** by causing true and accurate copies of such paper to be filed and transmitted
5 to all counsel of record via the Court's CM/ECF electronic filing system.

6 /s/ Rafey Balabanian